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In the Supreme Court of the State of Utah

H. M. GRIBBLE,
Plaintiff and Appellant.

vs.

MRS. EMMA COWLEY,
Defendant and Respondent.

No. 6224

Brief of Appellant

W. D. BEATIE,
*Attorney for Plaintiff
and Appellant.*

FILED

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In the Supreme Court of the State of Utah

H. M. GRIBBLE,
Plaintiff and Appellant,

vs.

MRS. EMMA COWLEY,
Defendant and Respondent.

No. 6224

Brief of Appellant

STATEMENT

This is an appeal by appellant, H. M. Gribble, plaintiff below, from a judgment made and entered in the Seventh District Court of San Pete County, Utah, on September 27, 1938, and made final on the 19th day of June, 1939, by the order of said Court overruling the motion of said plaintiff for a new trial of said action.

William Hale Gribble, age fourteen years, was a resident of Gunnison, Utah, and was a student at the Gunnison High School. On the 13th day of December,

1937, the said William Hale Gribble was riding his bicycle home after school, and had been riding on the dirt sidewalk on the East side of Highway No 89, as the said highway approached the San Pitch Bridge, proceeding in a Northerly direction, and as said decedent approached the Bridge, he came off of the sidewalk, as the said highway and sidewalk converged at the Bridge, and on the main highway, still proceeding in a North-erly direction. He was approximately half-way between the North and South extremities of the Bridge, and between one and one-half and two feet from the East edge of the Bridge, when the defendant driving her automobile in the same direction as the decedent was proceeding, struck the bicycle of the decedent, throwing him into the air and North of the point of impact. The decedent was struck in such a way that a severe head injury at the rear of the head was inflicted, and upon being taken to the doctor's office in Gunnison, he remained there until he was brought to Salt Lake for attention at the hospital, where he died on the morning of the 15th day of December, 1937.

The action was commenced by the serving of summons and the filing of a complaint against the defendant on the 18th day of March, 1938, and in the complaint defendant was sued for damages based on the negligence of the defendant herein described. The defendant filed an answer to the complaint admitting that she was at the scene of the accident on the day alleged in the complaint; that she admitted that the automobile which she was driving and operating did strike upon and against the body and bicycle of William Hale

Gribble; that William Hale Gribble was by reason thereof thrown and hurled a considerable distance; that upon the 15th day of December, 1937, the said William Hale Gribble died from injuries received thereof; but denied that she was at the time operating or driving her automobile carelessly or negligently, or at a great, excessive or unlawful rate of speed, or that she carelessly or negligently failed to keep a careful, or any lookout for persons along or upon said highway, or that she carelessly or negligently failed to have said automobile under control, or that she failed to observe any traffic rule or regulation required by law. The effect of the answer of the defendant is simply to deny the negligence alleged in the complaint and there is no defense in this action of contributory negligence.

The case was tried to a jury starting on the 22nd day of September, 1938, upon the complaint and answer filed in this action, and the jury returned a verdict for the defendant, "no cause of action," in the early morning of September 27, 1938. (Ab. 14).

The plaintiff within time filed his motion for a new trial. (Ab. 15-16).

In support of his first ground for granting the new trial, "misconduct of the jury," the plaintiff secured and served upon counsel for the defendant, and filed with the Clerk of the Court, the affidavits of two persons, namely: Mrs. Gladys Nielson and Mrs. H. M. Gribble (Ab. 16-18). Both affidavits were to the effect that statements were made in the jury room that even though

the plaintiff, H. M. Gribble, was entitled to recover, Hale Gribble was more negligent than Mrs. Cowley at the scene of the accident, and that the plaintiff because of the negligence of said Hale Gribble, was not entitled to recover. Further statements were made that the cause of the accident was the negligence of Hale Gribble turning into the car of Mrs. Emma Cowley. (Ab 16-18).

Plaintiff's motion for new trial was argued and on the 19th day of June, 1939, the Court denied plaintiff's motion for a new trial. (Ab. 19).

ASSIGNMENT OF ERROR

The errors of the trial court upon which the plaintiff relies for a reversal of this case are as follows:

I.

The evidence is insufficient to justify the verdict in the following particulars:

That there was no issue of contributory negligence in this trial; that the jury were instructed that the sole issue in the cause was whether or not the defendant was negligent as alleged in plaintiff's complaint; and that there was no evidence of negligence on the part of William Hale Gribble, the decedent, which said negligence might be imputed to his father, the plaintiff in this action.

II.

Misconduct of the jury in the following particulars:

(a) Considering in the jury room and discussing the negligence of the defendant and the contributory negligence of the plaintiff's deceased son, when the Court had given Instruction No. 14, which instruction stated that the sole issue in the cause was the negligence of the defendant.

(b) That the jury in their jury room discussion stated that the defendant was guilty of negligence in causing the death of the decedent, and by deciding that the defendant, Mrs. Cowley, was negligent, it then became the duty for the jury to determine just one matter, to-wit: what amount of damages was sustained by the plaintiff and render a verdict in that amount.

(c) That the jury considered facts outside of the scope of the pleadings and trial, namely: contributory negligence of the decedent, when the sole issue in the case was the negligence only of the defendant.

(d) That the jury sent word to the Judge in the cause that they wished further instructions in the case, and upon being informed that the jury were to read the instructions and decide the case accordingly, the jury voted on the verdict and three jurors changed their verdict, so that the vote was eight to nothing for "no cause of action," and that the last vote of the jurors was influenced by the information sent to the jury by the Judge in the cause. (Ab. 65-66).

ARGUMENT

I.

DENIAL OF MOTION FOR NEW TRIAL

The court erred in refusing plaintiff's motion for new trial for the following reasons:

The pleadings fix the issues to be determined in the cause as submitted to the jury as to the evidence adduced at the trial. The complaint alleges that the defendant was negligent in driving and operating her automobile carelessly and negligently, and at a great, excessive and unlawful rate of speed, to-wit: in excess of 40 miles per hour; that she negligently failed to keep a careful or any lookout for any persons along and upon said highway; that she failed to have her automobile under control and drove and operated said automobile to the right hand side of the highway, and negligently failed to give any signal whatsoever of her intention to pass said deceased on his left, and in passing said decedent, failed to proceed as required by law and ordinances of the City of Gunnison with reference to speed, sounding of horn and distance of passing on the left. The defendant entered a general denial of the acts of negligence alleged by the plaintiff, and did not set up any plea of contributory negligence of the decedent which could be imputed to the plaintiff in this case.

A

PLEA OF CONTRIBUTORY NEGLIGENCE
NECESSARY, UNLESS PLAINTIFF'S EVIDENCE
SHOWS NEGLIGENCE.

In the case of *Smith vs. Ogden & N. W. R. Co.*, 33 Utah 129; 93 Pac. 185, Justice Straup at page 136 of the Utah Report says:

“The rule obtains in this jurisdiction that the plaintiff is not required to allege nor prove in the first instance his freedom from negligence. He is required to allege and prove negligence on the part of the defendant, and that such negligence, as a natural and direct result, occasioned the injury. The burden of proving contributory negligence is upon the defendant, unless it is shown by plaintiff’s evidence.”

The court further says at page 137:

“If there is no evidence either on the part of the plaintiff or the defendant on such issue, the court should not submit that issue to the jury anymore that it should submit any other issue to them upon which there is no evidence.

“A plea of contributory negligence is essential only to entitle the defendant to introduce evidence in support of such a defense. The general denial puts in issue such of the general averments of the complaint as the plaintiff is bound to prove in order to maintain his action. Under the general issue, the defendant may introduce any evidence which tends to disprove the negligence charged against him, or which tends to disprove the casual connection of his negligence and the injury; but a plea of contributory negligence is essential to entitle the defendant to introduce evidence which does not tend to disprove such facts, but which merely tends to prove negligence on plaintiff’s part, concurring and combining with the defendant’s negligence, and as a proximate cause contributing to plaintiff’s injury. That is to say, the defendant, under the general issue, may not introduce evidence which does not tend to disprove his negligence or its casual connection, or the averments essential to

plaintiff's recovery but which, nevertheless, tends to relieve him of the legal consequences of his negligence. To do so a special plea is necessary."

The court further says at page 138:

"But the defendant, under the general issue, may not show that the plaintiff was guilty of what in law is termed 'contributory negligence.'

* * * For these reasons the general rule obtains that the defense of contributory negligence is not available as a defense, if not specially pleaded, unless plaintiff's evidence discloses such negligence."

In the case of *Andreason vs. Ogden Railway and Depot Company*, 8 Utah 128, Justice Anderson at page 132 says:

"The question of the negligence of the respective parties was a question which it was the special province of the jury to determine under proper instructions from the Court."

The question of contributory negligence in this case was not within the scope of the functions of the jury to decide for the reason that Instruction No 14, delivered by the Court to the jury, is as follows:

"You are instructed that the sole issue in this case is a question of whether the defendant was negligent as alleged in the plaintiff's complaint, or was not negligent, and if you find and believe from a preponderance of the evidence introduced before you, that the defendant, Mrs. Emma Cowley, was negligent as defined in these instructions, then, you shall render a verdict for the plaintiff and against the defendant and determine the amount of his damage, if any; otherwise if you find that the defendant is not charge-

able with any act or acts of negligence alleged within the complaint, then you shall render a verdict for the defendant, 'no cause of action'. "

This Instruction No. 14, limits the issue in the case to the question of whether or not the defendant, Mrs. Emma Cowley, was negligent.

B.

DUTY OF JURY TO FOLLOW COURT'S INSTRUCTION

There can be no argument that it is the duty of a court during trial to give instructions to the jury as to the issues involved, and that the jury must follow the instructions of the court, whether said instructions be right or wrong.

In the case of *Ryan vs. Beaver County* 82 Utah 27; 21 Pac (2nd) 858, Justice Moffat, in writing the opinion states:

"The jury is bound on questions of law to yield full obedience to the instructions of the court, and this applies as well to that part of the charge defining the issues as made by the pleadings as to the law as declared by the court and made applicable to the evidence as submitted."

In the case of *City of Decatur vs. Finley*, 127 So. 518, the Court at page 518 of the Report says:

"The court erred in its instruction on the subject of interest. * * It was the duty of the jury nevertheless to follow the court's instruction."

In the case of *Salter vs. Turner*, 130 So. 163, the Court at page 164 of the Report says:

“It is essential to an orderly administration of justice, that the jury should obey the instructions of the court.”

In the case of *Copeland et al vs. Benson Hardware Company*, 131 So. 1, the Court at page 2 of the Report says:

“It was the duty of the jury to act in accord to the direct instructions of the court, and, failing so to do, the court properly required this action by the jury. It has been well said: ‘It is essential to an orderly administration of justice that juries should obey the instructions of the court. If the court is in error in giving instructions the jury should, nevertheless, obey the instructions, and the injured party would have recourse by appeal to this court, which is the proper form to pass upon the actions of the trial court.’ ”

In the case of *Redo Y Cia vs. First National Bank of Los Angeles*, 200 Cal. 161, 252 Pac. 587, the court at page 589 of the Report says:

“It is the province and the duty of the court to instruct the jury upon the law, and such instructions are binding on the latter in its deliberations.”

In the case of *Farguet vs. De Senti et al*, 148 Atl. 139, the court at page 141 of the Report says:

“The jury is of course, bound to accept and apply principles of law governing the case before them.”

In the case of *Love vs. Ft. Dodge, D. M. and S. R. Co.*, 224 N. W. 815, the court at page 819 of the opinion says :

“Courts, and not juries, are to determine the law, and, when this is done, it is not for the fact-finding body to disregard it.”

In the case of *Winston vs. McKnab*, 134 Kan. 75, 4 Pac. (2nd) 401, the Court at page 403 of the Report says:

“Each litigant, the defendant no less than the plaintiff, was entitled to an answer to the question the jury were impanelled to determine.”

In the case of *Pfannebecker vs. Southern R. I. & P. Ry. Co.* 226 N. W. 161, the court at page 162 of the opinion says:

“Right or wrong, instructions must be followed, for they become the law of the case. ‘Courts and not juries are to determine the law and when this is done, it is not for the factfinding body to disregard it.’ (Citing Cases).”

In the case of *Louisville and N. R. Co. vs. Muncey*, 17 S. W. (2nd) 423, the court at page 430 of the Report says:

“And an instruction whether right or wrong binds the jury, and cannot be disregarded.”

In the case of *Cooper vs. Girdler*, 39 S. W. (2nd) 1009, the court at page 1011 of the Report says:

“It was the duty of the court to base the instructions on the pleading and proof, and the duty of the jury to follow the instructions.

“The court instructed the jury, and properly so, upon that issue. The jury disregarded the instructions; rendered a verdict contrary to the instructions. Hence the verdict under the opinions of this court, is contrary to the law (Citing Cases). The rule is generally established that where a verdict is contrary to the instructions it is contrary to law and the court is to be authorized to and it is its duty to, set such a verdict aside and grant a new trial.”

In the case of *Wendel vs. Metropolitan Life Ins. Co.*, 83 Mont. 252, 272 Pac. 245, the court at page 248 of the Report says:

“These instructions, whether right or wrong, stated the law applicable to the case, and should have been followed by the jury in arriving at a verdict.”

In the case of *Thornton et al vs. Wallace et al*, 277 Pac. 417, the court at page 418 of the Report says:

“It being clear that the jury disregarded this specific instruction, and that the evidence was insufficient to have justified the verdict as rendered, the verdict is ‘contrary to law,’ and the court erred in denying defendant’s motion for new trial.”

In the case of *Alexander Drug Co. vs. Whitaker et al*, 146 Okla. 61, 293 Pac. 264, the court at page 266 of the Report says:

“The jury are not permitted to disregard the law and the evidence and arbitrate the matters submitted to them according to their own theories of what may be right between the parties, which is in reality deciding it merely according to their own whim, and in disregard of the evidence given at the trial.”

In the case of *Western Montana National Bank vs. Home Insurance Company of New York*, 75 Mont. 16, 241 Pac. 611, the court at page 612 of the Report says:

“These instructions became the law of the case, and whether right or wrong, were binding upon the jury.”

In the case of *Daigle vs. Rudbeck*, 154 Wash. 536, 282 Pac. 827, the court at page 828 of the Report says:

“It was the duty of the jury to follow the law as given to it by the trial court and as we have seen by the instruction which we have already quoted, the jury were told in effect that the plaintiff was entitled to receive such sum as would fairly and fully compensate him for the injuries he might be found to have received. * * * Not having done so, it is apparent that the jury erroneously disregarded our law and failed to follow the court’s instruction and therefore there was error in the assessment of damages.”

C.

TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT MOTION FOR NEW TRIAL.

It is recognized that a motion for new trial is originally addressed to the sound discretion of the trial court, but the contention here is that the trial court abused its discretion in failing to grant the motion for a new trial.

The Court will remember that this case was tried before a jury at the end of which a verdict, “no cause of action” in favor of defendant had been returned and judgment rendered thereon. After this case had gone

to the jury, and the jury had retired to the jury room for deliberation, certain discussions amongst the jurors were heard to include statements as to the negligence of the decedent, William Hale Gribble, and that even though the plaintiff was entitled to recover, because of the negligence of plaintiff's deceased son, that the plaintiff, therefore, was not entitled to recover. Statements were also overheard that the decedent had been more negligent than the defendant at the scene of the accident. There is no contradiction and no proof contra to the fact that statements consisting of the element of contributory negligence were discussed within the jury room. The affidavits attached to the motion for new trial were those of two independent witnesses that had overheard the discussions in the jury room, which affidavits appear in the abstract at pages 16, 17 and 18, and which read as follows:

“A F F I D A V I T

“STATE OF UTAH,
COUNTY OF SAN PETE ss.

“MRS. GLADYS NIELSON, being first duly sworn, upon oath, deposes and says:

“That on the evening of September 26, 1938, at about the hour of 9:30 o'clock P. M. of said day, she was walking in company with her sister-in-law, Mrs. H. M. Gribble, in the Court House grounds at the Southwest corner of the County Court House, at Manti, Utah, while the jury was deliberating in the case of 'H. M. Gribble, plaintiff, vs. Mrs. Emma Cowley, defendant,' and that during the deliberations of the jury in the above entitled case, that she heard statements made

within the jury room through the open windows of the said jury room in substance and effect as follows:

“That even though the plaintiff, H. M. Gribble, was entitled to recover, Hale Gribble was more negligent than Mrs. Cowley at the scene of the accident and that the plaintiff because of the negligence of said Hale Gribble, was not entitled to recover.

“That statements were likewise made which came from said jury room to the effect that Hale Gribble had been more negligent than Mrs. Cowley.

“That statements were made that the cause of the accident was the negligence of Hale Gribble turning into the car of Mrs. Emma Cowley.

(SIGNED) MRS. GLADYS NIELSON

“Subscribed and sworn to before me this 13th day of October, 1938.

(SIGNED) D. E. BORG,
Notary Public,
residing at Gunnison.”

“A F F I D A V I T

“STATE OF UTAH, }
COUNTY OF SAN PETE } ss.

“MRS. H. M. GRIBBLE, being first duly sworn upon oath, deposes and says:

“That on the evening of September 26, 1938, at about the hour of 9:30 o'clock P. M. of said day, she was walking in company with her sister-in-law, Mrs. Gladys Nielson, in the Court House grounds at the Southwest corner of the County Court House at Manti, Utah, while the jury was deliberating in the case of 'H. M. Gribble, plaintiff, vs. Mrs. Emma Cowley, defendant,' and that

during the deliberations of the jury in the above entitled case, that she heard statements made within the jury room through the open windows of the said jury room in substance and effect as follows:

“That even though the plaintiff, H. M. Gribble, was entitled to recover, Hale Gribble, was more negligent than Mrs. Cowley at the scene of the accident and that the plaintiff, because of the negligence of said Hale Gribble, was not entitled to recover.

“That statements were likewise made which came from said jury room to the effect that Hale Gribble had been more negligent than Mrs. Cowley.

“That statements were made that the cause of the accident was the negligence of Hale Gribble turning into the car of Mrs. Emma Cowley.

(SIGNED) MRS. H. M. GRIBBLE.

“Subscribed and sworn to before me this 13th day of October, 1938.

(SIGNED) D. E. BORG,
Notary Public,
residing at Gunnison.”

Upon the motion for a new trial, the testimony of Mrs. Gladys Nielson, Mrs. H. M. Gribble, Alonzo King and J. Lawrence Lowry was offered and received by the trial court. The matter was then argued to the court, and the court then took the same under advisement, and on the 19th day of June, 1939, denied the motion for a new trial. The view which was taken by the Court, I feel is at variance with the authorities for the reason that the testimony of Mrs. Gladys Nielson and Mrs. H. M. Gribble was very similar to that as has hereinbefore been set forth by the affidavits attached to the motion

for a new trial, and, in addition, testimony of two jurors was offered and received.

Mr. Alonzo King, one of the jurors, at the trial of this case, testified as follows:

“Q. Your name is Alonzo King?

“A. Yes, sir.

“Q. And you were one of the jurors duly impanelled in the case of H. M. Gribble vs. Mrs. Emma Cowley?

“A. Yes, sir.

“Q. Was there any statement or any discussion had by and between any of the jurors impanelled with reference to the negligence of the deceased, William Hale Gribble?

“A. Yes.

“Q. Isn't it a fact, Mr. King, that the discussion from the time, the bulk of the discussion from the time you returned from dinner on that evening at the Savoy Hotel was taken up as between the jurors in discussing the relative items of the negligence of Mrs. Cowley as compared with the negligence of William Hale Gribble?

“A. Yes.

“Q. Isn't it a fact, Mr. King, that is almost the entire discussion that was had on that evening in the jury room?

“A. Yes, sir.”

J. Lawrence Lowry, one of the jurors at the trial of this case testified as follows:

“Q. First of all, I am sorry we had to call you, Mr. Lowry. Your name is J. Lawrence Lowry?

“A. Yes, sir.

“Q. You were one of the jurors impanelled to hear and did hear the case and render a verdict in the case of H. M. Gribble vs. Mrs. Emma Cowley?

“A. I was.

“Q. As a matter of fact, you were designated as Foreman of that particular jury, were you not?

“A. I was.

“Q. I will ask you, Mr. Lowry, if it isn't a fact that there was discussion within the jury room with reference to the relative negligences as between William Hale Gribble and Mrs. Emma Cowley on that particular evening?

“A. There was some.

“Q. I will ask you this then: Isn't it a fact that most of the time during the deliberations of the jury on that particular evening was the discussion as between the fact that William Hale Gribble was negligent and that Mrs. Cowley was also negligent, and that William Hale Gribble was more negligent than Mrs. Cowley was?

“A. No, sir, that is not a fact. The most of the discussion was as to whether Mrs. Cowley was negligent or not.

“Q. It is a fact, however, there was a discussion as to the negligence of William Hale Gribble?

“A. A little discussion, but no ballots taken.”

There can be little doubt that, according to the adjudicated cases, the affidavit of the juror is in no different position than that of the testimony of the juror as to facts occurring within the jury room during the consideration of the case.

The question arises as to what the juror may testify to after the decision in any matter.

In the case of *Ogden L. & I. Ry. Co. vs. Jones et al*, 51 Utah 62; 168 Pac. 548, Chief Justice Frick at page 70 of the Utah Report says:

“If a juror is actually guilty of misconduct, one or more of the other jurors may testify to the facts constituting the alleged misconduct, or the same may be proved by any witness who observed and knows the facts.”

In the case of *Moulton vs. Staats, et al*, 83 Utah 197, 27 Pac. (2nd) 455, District Judge Christensen at page 458 of the opinion says:

“From the order it is apparent that there was a plain disregard by the jury of the instructions of the court, which should have satisfied the court that the verdict was rendered under a misapprehension of such instructions.”

In the case of *Farmers' Sav. Bank of Bunch vs. Smith*, 234 N. W. 798, the Court at page 801 of the Report says:

“We have here a case, however, of assertion by jurors of matters as facts not shown by the evidence, yet inducing their conclusions and made for the purpose of inducing the same conclusion in the minds of other jurors. On this record the case presented to the trial court was not one for the exercise of judicial discretion. It was one on which plaintiff was entitled to a new trial as matter of right.”

In the case of *Hamilton vs. Snyder*, 182 Wash. 688, 48 Pac. (2nd) 245, the Court at page 246 of the opinion says:

“Our previous cases upon the subject are collated, discussed and considered in *Lyberg vs. Holz*, 145 Wash. 316, 259 P. 1087, and the conclusion there reached follows the pronouncement of this court in *State vs. Parker, supra*, and in *Maryland Casualty Co. vs. Seattle Electric Co.*, 75 Wash. 430, 134 P. 1097, to the effect that the court may consider the affidavits of jurors so far as they state the facts showing misconduct, but not as they attempt to show the effect of the misconduct upon the verdict.”

In the case of *State vs. Parker*, 25 Washington 405; 65 Pac. 776, the Court says:

“In considering the affidavits filed, we entirely discard those portions which may tend to impeach the verdict of the jurors, and consider only those facts stated in relation to misconduct of the juror, and which in no way inhere in the verdict itself. It is not for the juror to say what effect the remarks may have had upon his verdict, but he may state facts, and from them the court will determine what was the probable effect upon the verdict. It is for the court to say whether the remarks made by the juror in this case probably had a prejudicial effect upon the minds of other jurors. We do not see how any other conclusion can be reached than that they were highly prejudicial, including, as they did the statement of alleged damaging facts concerning appellant which had not been introduced in evidence upon the trial.”

In the case of *Ryan vs. Beaver County*, 82 Utah 27, 21 Pac. (2nd) 858; Justice Moffat on page 860 of the Pacific Report, cites the case of *Jensen vs. Utah Ry. Co.*, 72 Utah 366 at page 400; 270 Pac. 349, 362, which states as follows:

“However, where the committed error is of such nature or character as calculated to do harm, or on its face as having the natural tendency to do so, prejudice will be presumed, until by the record it is affirmatively shown that the error was not or could not have been of harmful effect. Thus, if the appellant shows committed error of such nature or character, he, in the first instance, has made a prima facie showing of prejudice. The burden, or rather the duty of going forward, is then cast on the respondent to show by the record that the committed error was not, or could not have been, of harmful effect. *State vs. Cluff*, 48 Utah, 102, 158 P. 701; *Jackson, State et al. vs. Feather River & Gibonsville Water Co.*, 14 Cal. 19; *Thelin vs. Stewart*, 100 Cal. 372, 34 P. 861; 2 Hayne, New Trial and Appeal (2nd Ed.) pp. 1608-1614.”

It is the contention of the appellant that error was committed by the jurors when they discussed the element of contributory negligence during their jury deliberations in this case, and that the testimony of Mrs. Gladys Nielson, Mrs. H. M. Gribble, Alonzo King and J. Lawrence Lowry clearly shows that the argument of contributory negligence was of such a nature as would do harm to the plaintiff's rights, or as Justice Moffat has so well said as the citation is taken from the case of *Jensen vs. Utah Ry. Co.*, supra, that on its face the discussion of the item of contributory negligence would have a natural tendency to do harm, and it is earnestly suggested that prejudice should be presumed as against the rights of the plaintiff in this action. Further the record does not show that the error was not, or could not have been of any harmful effect as there was no testimony on the part of the defendant other than the

cross examination of the plaintiff's witnesses on the motion for new trial. Citations upon the subject could be multiplied almost without end and various cases could be brought to the court's attention, but we think that the rule is amply set forth by the decisions of our own State.

D.

THAT THE LAST VOTE OF THE JURORS WAS INFLUENCED BY THE INFORMATION SENT TO THE JURY BY THE JUDGE IN THE CASE.

The jury had taken several ballots on attempting to reach a verdict in this case, when the jury requested along in the early morning of September 27, 1938, that the Judge render further instructions in this case. This information was obtained on the motion for new trial, as follows:

J. Lawrence Lowry, a witness for the plaintiff on motion for new trial, testified as follows:

“Q. The request was made by the jurors in that particular case for further instruction, was it not, on that night or the following morning?”

“A. Well, we called to inform him we weren't together.

“Q. Immediately after the discussion on the information by which the Judge informed you that you would have to read the instructions and decide the case thereupon, or something to that effect, a jury verdict was reached, was it not?”

“A. Yes, sir.”

Alonzo King, a witness for the plaintiff on motion for new trial, testified on direct examination by Mr. Beatie, as follows:

“Q. Was it not a fact that immediately after the Court, or immediately after the jury had requested further instructions, or some instruction from the Judge, that a ballot was taken upon this particular verdict, and that it was eight to nothing at that time?

“A. Yes.”

Alonzo King on cross examination by Mr. Erickson, testified, as follows:

“Q. You voted in the negative? You voted with the Gribble’s stand up to the last, didn’t you?

“A. Yes, sir.

“Q. You were the juror that hung out, weren’t you?

“A. I was one of them.”

It is earnestly contended that the word sent back to the jury in this cause in the early morning hour when they requested further instructions from the court, influenced the jury to such an extent that immediately a ballot was taken to get rid of the case, at which time the ballot was changed from the previous count of five to three, to the final ballot of eight to nothing, and upon which verdict the jury then rendered the verdict of “no cause of action.”

When it is looked into and understood that the jurors impanelled to try this case were mostly farmers

and ranchers, they were very reluctant to sit up all night discussing this case in attempting to reach a verdict. When the court advised them to read the instructions and decide the case, the jurors naturally resented that situation for the reason that they had informed the Judge that they could not get together, and for that reason asked for further instructions with the result that it was detrimental and harmful to the plaintiff's law suit, so much so that the jury immediately arrived at a verdict in order to relieve themselves of any more discussion in the early morning hours of September 27, 1938, such that the jury was wrongfully influenced into reaching a verdict without thought as to the facts they were to decide the issue upon.

In conclusion it is submitted that the evidence is uncontradicted and clear that the jury discussed an issue outside of the realm of their jurisdiction to decide, according to the testimony adduced in this case. The effect which was had upon the jury by reason of discussing the contributory negligence of William Hale Gribble, the deceased, cannot in any way be measured as to what influence it had upon any or all of the jurors impanelled in this case. It is the belief of the writer of this brief that it was wholly through a misapprehension of the issues on this case on the part of the jury, that the question of contributory negligence was even discussed, for it is very seldom that a personal injury case is tried in which the defense of contributory negligence is not used, and it would be most natural for the jurors to assume that the discussion of contributory negligence was a proper element in the case for the reason that laymen might

very easily misunderstand or misconstrue the effect of the instructions of the court who acts from a legal standpoint and in which naturally the wording of any instruction is peculiar to the legal profession and understood by it, where it might very easily be misunderstood by any juror impanelled in this, or any other case.

CONCLUSION

By way of resume, and in conclusion, the plaintiff and appellant submits:

First: That this court should reverse the judgment entered by the trial court in this action because of the error of the court committed in the denial of plaintiff's motion for a new trial based on the testimony of Mrs. Gladys Nielson, Mrs. H. M. Gribble, Alonzo King and J. Lawrence Lowry, showing that contributory negligence was discussed in the jury room and that the effect of the statement was prejudicial to the plaintiff's cause of action.

Second: Influencing the jury to render a verdict when they asked for further instructions and were told to read the instructions and decide the case, which resulted in an immediate change in the voting of certain jurors who were in favor of a verdict for plaintiff, such that their vote was changed to favor the defendant for no cause of action.

Respectfully submitted,

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and Appellant.*